

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

ANDREW MATTHEW MARTINEZ,  
*Petitioner.*

No. 2 CA-CR 2016-0293-PR  
Filed December 5, 2016

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
NOT FOR PUBLICATION  
*See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.*

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Petition for Review from the Superior Court in Pima County  
Nos. CR20153399001 and CR20153400001  
The Honorable Richard D. Nichols, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

Barbara LaWall, Pima County Attorney  
By Jacob R. Lines, Deputy County Attorney, Tucson  
*Counsel for Respondent*

Andrew Matthew Martinez, San Luis  
*In Propria Persona*

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**MEMORANDUM DECISION**

Judge Staring authored the decision of the Court, in which Presiding Judge Howard and Judge Espinosa concurred.

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STARING, Judge:

¶1 Petitioner Andrew Martinez seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Martinez has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, Martinez was convicted of trafficking in stolen property in CR20153399001 and of burglary in the second degree in CR20153400001. The trial court imposed concurrent sentences, the longer of which was ten years. Approximately two weeks later, Martinez filed a petition for post-conviction relief stating he "was given way to[o] much time for [his] crimes," he was "given 'consecutive' sentences," and was "given a 10 year sentence" when his plea did not provide for that. The trial court rejected the petition, noting no notice of post-conviction relief had been filed, the sentences had been ordered to be served concurrently, and the plea agreement provided for up to a 16.25-year sentence. Martinez filed a motion for reconsideration, and the court appointed counsel, stating Martinez had filed "a Notice for Post-Conviction Relief pertaining to a Change of Plea."<sup>1</sup>

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<sup>1</sup>After filing his motion for reconsideration, but before the trial court appointed counsel, Martinez filed a petition for review in this court, which we dismissed.

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¶3 Appointed counsel filed a notice stating she was unable to find an arguable issue to raise in the Rule 32 proceeding, and the trial court granted Martinez leave to file a pro se petition. In that petition Martinez argued his sentence violated his double jeopardy and due process rights. He argued the “use of his criminal history to enhance the range of sentence under A.R.S. [§] 13-703 and as an aggravating factor . . . constitutes a Double Jeopardy violation.” And he contended “consecutive terms of community supervision would violate . . . the Double Jeopardy Clause.” Furthermore, he argued his ten-year sentence was illegal because the court imposed an aggravated sentence based on his criminal history and financial harm to the victim. The trial court summarily denied relief.

¶4 On review, Martinez again asserts his ten-year sentence was illegal. He argues he “should have been sentenced as a first time offender” because the court used the same conviction to both enhance and aggravate his sentence. But, as the trial court pointed out, this court has expressly rejected Martinez’s argument. *State v. Bonfiglio*, 228 Ariz. 349, ¶ 21, 266 P.3d 375, 380 (App. 2011). “A trial court may use the same convictions to enhance or increase the sentencing range and to aggravate a defendant’s sentence within the enhanced range.”<sup>2</sup> *Id.*

¶5 Martinez also asserts for the first time that two aggravating factors were required because the court imposed more than the presumptive term. And he contends “criminal history and the extensive financial loss to the victim are not aggravator[s] listed under A.R.S. [§] 13-701(D).” Because Martinez did not raise this argument below, we need not address it. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review shall contain “[t]he issues which were decided by the trial court and which the defendant wishes to present” for review). In any event, because Martinez received a

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<sup>2</sup>Martinez contends *Bonfiglio* “is not the control[ing] case here” because of a subsequent memorandum decision issued in that case. But such decisions may not be cited as precedent. *See* Ariz. R. Sup. Ct. 111(c).

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sentence greater than the presumptive, but not the statutory aggravated term, A.R.S. § 13-703(K), on which he relies, does not apply.

¶6 For these reasons, although we grant the petition for review, we deny relief.